IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1128 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE D.N.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

VRUSHTHI FINANCIAL SERVICES LTD.

Versus

GOLDCOIN HEALTH FOODS LTD.

Appearance:

1. Special Civil Application No. 1128 of 2004

MR TARANG P PANDYA for Petitioner No. 1

MR SAMIR J DAVE for Respondent No. 1

MR MB GANDHI for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE D.N.PATEL

Date of decision:-26/11/2004

C.A.V. JUDGEMENT

1. The present petition has been filed against the

judgment and order passed by the Chamber Judge, Court No.10, City Civil Court, Ahmedabad in Summary Suit NO.2917 of 2001 dated 20-11-2003.

2. The present petitioner is original defendant and the present respondents is the original plaintiff in Summary Suit No.2917 of 2001. The said suit was filed by the respondents against the present petitioner before the City Civil Court, Ahmedabad for recovery of Rs.81,63,012/- with 18% p.a. interest and costs from the present petitioner towards the amount lent in the year 1995-96 by cheque of Rs.50.00 lacs and Rs.10.00 lacs.

3. Upon issuance of the summons for judgment in the aforesaid suit on the present petitioner under Order XXXVII of the Civil Procedure Code. The petitioner applied for leave to defend the suit.

4. I heard the learned advocates for the parties.

5. Learned advocate for the submitted that there are triable issues. There is total denial of any amount received by the present petitioner as alleged by the respondent and since injunction in respect of the properties mentioned in the Schedule annexed to the notice of motion application is affirmed till final disposal of the suit, there was no need for the trial Court to order the present petitioner to deposit Rs.40.00 lacs in the Court as a condition precedent to defend the suit. It is also argued by the learned advocate for the petitioner that as per the arrangement entered with the respondent the present petitioner applied for 3 lacs Equity Shares of the face value of Rs.10/- each and upon allotment of shares, the same were transferred to Shri Devang B. Shah, Managing Director of the respondent. Thus, the amount of Rs.30.00 lacs was utilized by the petitioner in applying the said shares. Learned advocate for the petitioner also relied upon several judgments reported in; 1992 (2) G.L.R. 1296, (1998) 5 SCC 354, 1985 G.L.H. (UJ) 2, AIR 1977 Delhi 226, 1988 (1) GLH (UJ) 33 and (2003) 6 SCC 675 and has submitted that the order passed by the trial Court deserves to be quashed and set aside.

6. Learned advocate for the petitioner also submitted that the signatures of the Director of the Company on Promissory Notes are forged. He has also contended that the conditional order passed by the trial Court is unreasonably excessive and exorbitant. Learned advocate for the petitioner lastly submitted that the decree has already been passed by the trial Court in

favour of the respondent (original plaintiff) vide judgment and order dated 13-2-2004. However, the present petitioner can challenge the conditional leave to defend the suit granted by the trial Court.

7. Learned advocate for the respondent who is original plaintiff has submitted that the present petition has been filed against the order which does not suffer from any infirmity much less of like jurisdiction and hence it does not require any interference. It is also contended by the learned advocate for the respondent that the original plaintiff had advanced Rs.50.00 lacs on 2-2-1996 and Rs.10 lacs on 9-2-1996 by two different cheques in order to meet with the financial contingencies and the present petitioner had executed promissory note for Rs.50.00 lacs on 2-2-1996 and had promised to pay the said amount on demand. The present petitioner had also promised to pay interest at the rate of 18% p.a. with monthly compound interest. It is also submitted by the learned advocate for the respondent that the present petitioner has paid the amount towards interest after deducting TDS (Tax Deducted at Source) amount as per the provisions contained the Income-tax Act, 1961. The petitioner has also partly paid the principal amount during year 1997-98 to 1999-2000 by cheques to the respondent. As on 31-3-2000 as the present petitioner was liable to make payment of Rs.41,65,104/- towards the principal amount and on 2-2-2001 the present petitioner had acknowledged the amount by executing the promissory note for Rs.41,65,104/- which is produced at mark 3/4.

8. Learned advocate for the respondent also submitted that the petitioner has issued cheque on 10-5-2001 for the payment of the said outstanding amount and the said cheque is produced at mark 3/7 on the record of the case and on presentation of the said cheque in the Bank, the drawee Bank had returned the said cheque because of "insufficient funds" in the Bank Account of the present petitioner. Under these circumstances, the respondent is entitled to recover Rs.41,65,104/- by way of principal amount and Rs.39,97,908/- towards interest for the period running from 1-10-1996 to 31-5-2001 @ 18% p.a. Interest is to be calculated monthly rest compound. Learned advocate for the respondent also relied upon the documentary evidence including copy of the Accounts of the present petitioner for the period from 1-4-1995 to 31-3-2001 and has also produced the same at mark 3/6 on the record of the case. Learned advocate for the respondent has also produced Form No.16-A prescribed under the Income-tax Act, 1961 filled in by the present petitioner towards the payment of TDS amount on payment

of interest to the respondent on the amount advanced at mark 3/11 to 3/15.

9. Learned advocate for the respondent also submitted that there are self-contradictions in the reply filed by the present petitioner. The defence raised by the petitioner is bogus, sham, illusory and moonshine and therefore the order passed by the trial Court is true, correct and in consonance with law and hence the same deserves not to be interfered with by this Court in exercise of extra ordinary jurisdiction by this Court. Therefore, the petitioner may kindly be dismissed.

10. Looking to the facts and circumstances of the case, contentions and the documents on record, I am of the opinion, that the order passed by the trial Court is true, correct and in consonance with facts and law and deserves not to be interfered with by this Court, mainly due to the following facts and reasons :

i. It is a matter of fact that the present petitioner has received two cheques whereby Rs.60.00 lacs were received by the petitioner from the respondent (original plaintiff).

ii. Upon receipt of aforesaid amount the present petitioner had executed promissory note for Rs.50.00 lacs on 2-2-1996 which is produced on the record of the case at mark 3/3. The present petitioner has also issued receipt on his Letter-head for the receipt of the said amount vide mark 3/1 and 3/2. The said transaction had taken place in the year 1996 and the copy of the Books of Accounts is produced at mark 3/6.

iii. It is a matter of fact that the present petitioner has paid interest and also deposited TDS amount with the Income-Tax department under prescribed Form No.16-A during period of February, 1996 to August, 1996. The documents have been produced at mark 3/11 to 3/15.

iv. The present petitioner (original defendant) went on paying various amounts to the respondent (original plaintiff) towards the principal amount during the period from 1997-1998, 1998-1999 and 1999-2000. For the year 1997-1998 the petitioner has paid in Rs.2,37,500/- by way of various cheques and during the year 1998-1999 Rs.4,40,000/- and during the year 1999-2000 Rs.95,000/- has been

paid by the petitioner. Thus, it is evident from the record of the case that the amount as alleged by the respondent has been received by the present petitioner and thus the petitioner has made part payment towards the principal amount for three different years and has also paid interest as per the documents produced at mark 3/11 to 3/15 after deducting TDS amount under the provisions of the Income-Tax Account. Thus, part payment payments of the principal amount and interest has been established as per the aforesaid documents which also establishes relationship of creditor and debtor.

v. The petitioner went on paying the amounts upto 1999-2000 and the respondent carried forward the remaining balance amount of Rs. 41,65,104/as an outstanding amount as on 31-3-2000. The present petitioner has executed the promissory note for the said amount on 2-2-2001 duly signed by the petitioner's Managing Director Shailesh Thakkar and the said document has been produced at mark 3/4. There are also cheques issued for the said amount drawn on Corporation Bank bearing No.710301 dated 10-5-2001 and the said cheque was presented by the respondent before the drawee Bank and the same was returned unpaid for want of "sufficient funds" in the Bank Account of the present petitioner. Thus, the petitioner was liable to pay to the respondent Rs.41,65,104/to towards the principal amount as on 31-3-2001.

vi. From the Accounts produced by the respondent vide mark 3/6 it is abundantly clear that original plaintiff has not charged any interest receivable from the present petitioner for the period running from August,1996 onwards. Thus, the amount of interest comes to Rs.39,97.908/-

vii. It is observed in paragraph 6 of the judgment delivered by the Chamber Judge, Court No.10, City Civil Court, Ahmedabad below the summons for judgment exh.35 in Summary Suit No. 2917 of 2001 as under :

"... At this stage, it requires to be noted that the defendant has not raised any objection about calculation of interest amount at the rate of 18% monthly rest compound and also outstanding amount of Rs.41,65,104/- towards the principal amount."

This was the position before the trial Court. Whereas before this Court the learned advocate for the petitioner raised an objection as to rate of interest. It appears from the record and facts of the case that only for the sake of raising a defence, the defence has been raised by the present petitioner as to rate of interest. Otherwise, it is very clear from the documents produced at mark 3/11 to 3/15 (TDS deduction documents) that the interest was paid by the petitioner to the respondent. Thus, the interest has already been paid by the present petitioner.

viii. Defence raised by the petitioner in leave to defend the affidavit refers to denial that the original plaintiff has advanced a sum of Rs.60.00 lacs as temporary loan, as alleged. Thus, there is total denial about receipt of Rs.60.00 lacs by the petitioner from the respondent. In paragraph No. 3 of the reply to the application for injunction filed by the present petitioner as referred hereinabove for three different years i.e. 1997-98, 1998-99 and 1999-2000 the present petitioner has paid Rs.2,37,500/-, Rs.4,40,000/- and Rs.95,000/- respectively, by various cheques to the respondent towards the principal amount. If the amount is not received by the present petitioner, then the petitioner would not have been returned aforesaid amounts to the respondent. Similarly, it is pointed out by the learned advocate for the petitioner that there is no outstanding of amount of Rs.41,65,104/- to be by the petitioner to the respondent. It also appears that this contention mentioned in the leave to defend the affidavit is also a bogus, sham, illusory and moonshine. The present petitioner has also issued the promissory note on 2-2-2001 which is produced on the record of the case at mark 3/4 and the cheque dated 10-5-2001 was issued for the amount of Rs.41,65,104/- and the promissory note was also for the same amount of Rs.41,65,104/-. The said cheque was issued by the petitioner in the month of May, 2001 which has not been honoured by the drawee Bank "for want of sufficient fund" in the Bank Account of the present petitioner. The figures are exactly tallying (of the the cheque and the promissory note of the year 2001) with the outstanding amount as on 31-3-2001 as referred by the respondent and therefore the defence referred to in the affidavit for leave to defend is

absolutely bogus, sham, illusory and moonshine and hence the same was not accepted by the trial Court and accordingly the said defence is also not accepted by this Court.

ix. It is also a defence raised by the present petitioner that the signatures on the documents produced by the respondent are forged signatures of the Managing Director. The present petitioner has obtained, on his own, Hand-writing Expert's opinion which is produced on the record of the case at mark 45/2 and 45/3 and as per the said report (which has been obtained by the petitioner on his own and not by the order of the competent Court) reveals that the aforesaid promissory note and the cheques which bear the signatures are not written by the writer of blue encircled standard signature on agreement and power of attorney dated 29-6-1996 and also on the application dated 13-7-2001. Now, the question before this Court is whether such defence raised by the present petitioner is genuine or bogus, sham, illusory and moonshine. On careful consideration of the aforesaid contentions and documents on record, if a close look is given to the leave to defend the affidavit, it is crystal clear that after receiving the amount of Rs.60.00 lacs in the year 1996-96, the present petitioner has started making payment during the year 1997-98, 1998-99 and 1999-2000 for Rs.2,37,500/-, Rs.4,40,000/- and Rs.95,000/- respectively by various cheques unexplainly by the present petitioner. The aforesaid payments have been shrewdly suppressed and the aforesaid payments establish relationship between the petitioner and the respondent as debtor and creditor. No F.I.R. under the Criminal Procedure Code has ever been filed by the present petitioner alleging forged signature on cheque and promissory note till today. For the first time, in leave to defend, this defence is raised, therefore, the defence raised by the present petitioner is bogus, sham, illusory and therefore rightly not believed by the trial Court.

x. It is also contended by the learned advocate for the respondent that there is no F.I.R. or criminal complaint filed by the present petitioner for the forged signatures on the promissory note and the cheques alleged to have been made by the petitioner. Even there is

no counter claim made by the present petitioner against the respondent. Receipt of money has been established as the amount of Rs.60.00 lacs was paid by two different cheques (Rs.50.00 lacs and Rs.10.00 lacs. The said amount has been partly paid towards the principal amount. Amount of interest has also been paid and TDS amounts have been deducted by the present petitioner. The cumulative effect of these facts establish relationship of debtor and creditor between the petitioner and the respondent.

xi. In the entire Leave to Defend the affidavit, the present petitioner has not denied the aforesaid payments made to the original plaintiff and that too by the cheques. Still, there is one more reason to disbelieve the aforesaid defence of the present petitioner (the signatures on the promissory note and cheques were forged) from the fact that during 2-2-1996 to 31-7-1996 the petitioner has paid TDS amounts by filling up the Form No.16-A as required under the provisions of the Income-tax Act, 1961 and in the said Form No.16-A the address of the original plaintiff is shown and in whose Account the said amount is credited and the said documents are produced on the record of the case at mark 3/11 to 3/15.

xii. Rate of interest @ 18% p.a. has been denied by the present petitioner in the leave to defend the affidavit. It also appears that this defence is also bogus, sham, moonshine and illusory as it is evident from the documents mark 3/11 to 3/15 which are TDS deductions documents in Form No. 16-A as is required under the Income-tax Act, 1961. Looking to the amounts of interest calculated for the deductions of TDS the figures tally with principal amount of Rs.60.00 lacs and interest @ 18% p.a. e.g. interest calculated for the period running from 2-2-1996 to 31-3-1996 comes to Rs.1,67,168/- which is 18% p.a. on the principal amount of Rs.60.00 lacs (Page No.122 of Special Civil Application). It is also matter of fact that the present petitioner has not challenged the TDS forms produced on the record of the case at mark 3/11 to 3/15 nor the petitioner has given any satisfactory explanation for such payment made by him to the Income-tax Department in the original plaintiff's Account and therefore there is relation of the debtor and creditor between the

petitioner and the respondent. The petitioner has executed promissory note as stated hereinabove and Hand-writing Expert's opinion runs counter to the documents on record. The said Hand-writing Expert's report has been obtained by the petitioner on his own privately and not under any order of the competent court.

xiii. One more defence is raised by the petitioner that 3 lacs Equity Shares were applied by the present petitioner and the same have been transferred in the name of Devang B. Shah, Managing Director. The land admeasuring 30000 sq. yards situated at village Limbasi has been transferred by the petitioner to the respondent. Thus, it is contended by the present petitioner that Rs.30.00 lacs have been paid for applying shares and for the remaining amount land has been transferred to he original plaintiff by the present petitioner and therefore the order passed by the trial Court granting conditional leave to defend deserves to be quashed and set aside. Thus, the arguments advanced by the learned advocate for the petitioner looks attractive but is equivocal, illusory, sham, bogus and moonshine. If we look at the documents, it is clearly established that the aforesaid land has been transferred in favour of Patel Sanjaykumar Haribhai and Patel Suryakant Ratilal towards consideration ofRs.1,50,000/-. But the said land has not been transferred to the original plaintiff nor it is reflected in the document as to the purchaser's name in the sale deed relates to the original plaintiff. A copy of the sale deed is produced at mark 45/1. Thus, the land has been transferred to some else and not the original plaintiff. Defence has been raised by the present petitioner is only for the sake of raising and is not supported by any material or document. If the petitioner has transferred the land admeasuring 30000 sq. yards in favour of the respondent then there was no need to sign the promissory note on 2-2-2001 for the amount of Rs.41,65,104/-. In fact, all these defences are contradictory with the main defence raised by the petitioner in its leave to defend the affidavit whereby there is total denial of receipt of Rs.60.00. If the amount of Rs.60.00 has not been received, there was no need :

(a) To make payment of the principal amount

as referred in hereinabove for the years 1997-98, 1998-99 and 1999-2000 for Rs.2,37,500/-, 4,40,000/- and Rs.95,000/- respectively;

(b) There was no need for the petitioner to give interest to the original plaintiff and pay TDS amounts as referred in Form No.16-A filled up under the provisions of the Income-tax Act which are produced at mark 3/11 to 3/15;

(c) There was no need for the petitioner to purchase three lacs Equity Shares and transfer to the Managing Director;

(d) There was no need for the petitioner to transfer the land (as alleged by the petitioner) in favour of the respondent; and

(e) There was no need for the petitioner to execute a promissory note on 2-2-2001 for the amount of Rs.41,65,104/- (which is exactly tallying with the outstanding amount for Rs.60.00 lacs as on 31-3-2000) and therefore the defence raised by the present petitioner is sham, bogus, illusory and moonshine and therefore the order passed by the trial Court granting conditional leave is absolute true, correct and in consonance with facts and law and requires no interference in exercise of power under Article 227 of the Constitution of India by this Court;

xiv. Due to the aforesaid facts of the present case, the authorities cited by the learned advocate for the petitioner are not applicable to the facts of the present case.

xv. One more defence has been raised by the learned advocate for the petitioner that the properties enlisted in the Schedule annexed with the notice of motion preferred by the respondent has already been attached by the order of the trial Court and therefore the suit claim of the original plaintiff is adequately protected and there was no need to pass

conditional order granting leave to defend. This defence is also not genuine as there are six contradictions as referred in the Schedule and the order passed by the trial Court not to alienate, transfer or dispose of the aforesaid properties by way of sale, mortgage or otherwise till final disposal of the suit.

11. If we look at the documents including the reply filed by the petitioner, it is evident that as per paragraph No. 6 thereof the properties at Sr. No. 4 and 6 do not belong to the present petitioner. It is also stated in the said paragraph No.6 of the said reply that the property at Sr. No.5 in the said Schedule has also been mortgaged to Gujarat Industrial Investment Corporation and therefore, now according to the present petitioner himself, the properties shown at Sr. Nos. 2 and 3 in the said Schedule belong to them and value thereof is shown as Rs.21.00 lacs. If we look closely to these properties i.e. at Sr. Nos. 2 and 3 in the said Schedule, the said properties have been place under personal guarantee towards repayment of advance obtained by Nakoda Textiles to the tune of Rs.3 Crores from Indusind Bank. This fact is forthcoming from the additional affidavit by the original plaintiff vide exh.54 and the same has not been controverted at all by the present petitioner. Thus, there is no evidence on record to show that said properties for which permission for transfer has been granted by the trial Court are free from any encumbrances, charge or burden and the same are clear and marketable. Thus, the aforesaid plea raised by the present petitioner is also illegal, bogus, sham, illusory and moonshine.

12. In view of the aforesaid facts and circumstances of the case and material on record, there is no substance in the present petition and the impugned order passed by the trial Court granting conditional leave to defend is true, correct and in consonance with facts and law. Accordingly, this petition is dismissed. Rule is discharged, with no order as to costs.

(D.N. Patel, J.)

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